

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES JOSEPH HEIDENREICH,

Defendant-Appellant.

UNPUBLISHED

June 19, 2014

No. 315366

Cass Circuit Court

LC No. 12-010221-FH

Before: RONAYNE KRAUSE, P.J., and HOEKSTRA and WHITBECK, JJ.

PER CURIAM.

Defendant, James Joseph Heidenreich, appeals as of right his convictions, following a jury trial, of manufacturing marijuana,¹ possessing marijuana,² maintaining a drug house,³ possessing child sexually abusive material,⁴ producing child sexually abusive material,⁵ installing an eavesdropping device,⁶ and five counts of possessing a firearm during the commission of a felony (felony-firearm).⁷ The trial court sentenced Heidenreich to concurrent terms of 21 days in jail for his convictions of manufacturing marijuana, possessing child sexually abusive material, maintaining a drug house, installing an eavesdropping device, and possessing marijuana; 3 to 20 years' imprisonment for his conviction of producing child sexually abusive activity; and two years' imprisonment for four of his felony-firearm convictions. The trial court sentenced Heidenreich to a consecutive term of two years' imprisonment for his fifth felony-firearm conviction. We affirm.

¹ MCL 333.7401(2)(d)(iii) (less than 5 kilograms or fewer than 20 plants).

² MCL 333.7403(2)(d).

³ MCL 333.7405(1)(d).

⁴ MCL 750.145c(4).

⁵ MCL 750.145c(2).

⁶ MCL 750.539d.

⁷ MCL 750.227b.

I. FACTS

Heidenreich, Tammy O'Brien, and O'Brien's four children lived in Heidenreich's home. According to O'Brien, while looking for her cigarette lighter in Heidenreich's coat pocket, she found a compact disc from the family's video camera. She watched the disc and discovered that it contained a video recording of one of her daughter's friends, who was 17 years old, undressing and getting into the shower in the master bathroom. The recording showed the minor while she was completely naked and with her genital area exposed.

O'Brien testified that she was shocked. Concerned that Heidenreich might have a similar recording of her daughter, who was also 17 years old, O'Brien searched Heidenreich's work bag and found a memory card for a digital camera. O'Brien testified that the card contained a video recording of Heidenreich attempting to place a camera on a shelf in her daughter's room. O'Brien called the police.

Michigan State Police Detective Sergeant Fabian Suarez testified that he obtained warrants and went to Heidenreich's home at about 11:30 p.m. According to Detective Suarez, Heidenreich came to the door while holding a handgun. Heidenreich put the handgun on the ground and officers arrested him. Detective Suarez asked Heidenreich whether there were any other guns in the house. Heidenreich responded affirmatively. Detective Suarez testified that officers found three handguns in Heidenreich's bedroom when they searched the home. O'Brien's adult son, Brent O'Brien, testified that Heidenreich usually kept his guns in the master bedroom and carried a gun at all times.

According to Heidenreich, O'Brien suffered from depression and abused drugs and alcohol. Heidenreich testified that O'Brien asked him to install a video camera in the 17-year-old daughter's bedroom to monitor for drug activity. Heidenreich testified that O'Brien was heavily intoxicated at that time and did not remember. O'Brien testified that she never gave Heidenreich permission to put a camera in her daughter's room.

Heidenreich testified that he had mistakenly recorded the 17-year-old daughter's friend. According to Heidenreich, he set up a video camera in the master bathroom with O'Brien's permission to record their sexual activity. On the day he recorded the 17-year-old daughter's friend, he intended to record himself and O'Brien, and he was surprised to discover that the 17-year-old daughter and her friend were using the home's showers. O'Brien testified that she was not aware that Heidenreich had installed a video camera in the master bathroom. Detective Suarez testified that, when he asked Heidenreich about the recordings, Heidenreich acted confused and said that he did not know about them.

II. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

A claim that the evidence was insufficient to convict a defendant invokes that defendant's constitutional right to due process of law.⁸ Thus, this Court reviews de novo a defendant's challenge to the sufficiency of the evidence supporting his or her conviction.⁹ We review the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the prosecution proved the essential elements of the crime beyond a reasonable doubt.¹⁰ Circumstantial evidence and reasonable inferences arising from that evidence can prove the elements of a crime.¹¹

B. CHILD SEXUALLY ABUSIVE MATERIAL

1. LEGAL STANDARDS

It is a felony for a person to “cause[], or knowingly allow[] a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material”¹² It is also a felony to produce or possess material in which a child engages in a child sexually abusive activity.¹³ Child sexually abusive activity includes, among other things, “erotic nudity[.]”¹⁴

Erotic nudity is “the lascivious exhibition of the genital, pubic, or rectal area of any person.”¹⁵ Lascivious means “wanton, lewd, and lustful and tending to produce voluptuous or lewd emotions.”¹⁶ The child sexually abusive activity statute prohibits “the use of an otherwise benign image of a child exhibiting ordinary nudity to create what could fall within the definition of erotic nudity[.]”¹⁷

⁸ *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992). See *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970).

⁹ *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011); *People v Osby*, 291 Mich App 412, 415; 804 NW2d 903 (2011).

¹⁰ *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012).

¹¹ *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

¹² MCL 750.145c(2).

¹³ MCL 750.145c(2); MCL 750.145c(1)(o).

¹⁴ MCL 750.145c(1)(n); MCL 750.145c(1)(i).

¹⁵ MCL 750.145c(1)(h).

¹⁶ MCL 750.145c(1)(h).

¹⁷ *People v Riggs*, 237 Mich App 584, 590; 604 NW2d 68 (1999).

2. INNOCENT NUDITY, *PEOPLE v RIGGS*

In *People v Riggs*, this Court considered whether two videos provided evidence on which to bind a defendant over for child sexually abusive activity.¹⁸ The videotapes depicted “several hours of innocuous behavior” and “play between and among children.”¹⁹ The defendant made some of the recordings while parents were present.²⁰

In one video, the defendant focused a video camera on the crotch area of a child and recorded that child’s innocent exposure of her nude genital area.”²¹ The defendant edited the tape to repeatedly show the scene in slow motion.²² This Court concluded that the alleged conduct constituted producing images of erotic nudity.²³

In another video, the defendant recorded two sisters.²⁴ One girl asked the other girl whether she wanted to see her underpants.²⁵ The girl then exposed her vaginal area and laughed.²⁶ The defendant did not edit the scene but did replay it.²⁷ This Court concluded that the second tape constituted innocent child nudity, reasoning that “the replay is at normal speed and the camera was not focused exclusively on the child’s genital area.”²⁸

3. APPLYING THE STANDARDS

Heidenreich contends that the prosecutor did not prove that he possessed or produced child sexually abusive material because the nudity in his recording was ordinary nudity rather than erotic nudity. Heidenreich contends that this tape is like the second video in *Riggs* because it shows a child undressing and showering in an innocent manner. We disagree.

When considering whether an image is lascivious, federal courts are in conflict about whether courts may consider a defendant’s subjective reason for the materials or may only

¹⁸ *Id.* at 592-593.

¹⁹ *Id.* at 586.

²⁰ *Id.*

²¹ *Id.* at 587.

²² *Id.* at 592.

²³ *Id.*

²⁴ *Id.* at 587.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 593.

consider the “four corners” of the materials themselves.²⁹ In *Riggs*, a panel of this Court considered the circumstances surrounding the creation of the videos when determining whether videos were lascivious.³⁰ We will therefore consider the circumstances surrounding the video’s creation here, as well as the contents of the video itself.

Here, the recording depicted a 17-year-old undressing, getting into a shower, showering, getting out of the shower, and dressing again. There are contexts in which a child showering might not constitute erotic nudity. But here, Heidenreich began recording a few seconds before the minor began undressing and stopped recording shortly after the minor dressed. Thus, though the recording did not focus on the minor’s genitals, its focus was on the minor while her genitals were exposed. Heidenreich aimed the camera at an area in which the minor was likely to dress and undress and recorded the minor with a hidden camera during an intensely private activity. Unlike in *Riggs*, the recording was not part of a larger volume of innocent images. Further, unlike in *Riggs*, Heidenreich did not take the recording with permission or consent. We conclude that these circumstances allowed the jury to conclude that the child’s nudity was erotic, rather than innocent.

We recognize that Heidenreich did not edit the video to focus on the child’s genitals. But whether the defendant edited a video is only one circumstance that might render lascivious an otherwise innocent depiction of child nudity. Here, other circumstances supported a finding that the video depicted erotic nudity. The video here does not lose its erotic character simply because Heidenreich did not edit it. Viewing the evidence in the light most favorable to the prosecutor, a rational jury could find that the video portrayed erotic nudity. We conclude that sufficient evidence supported Heidenreich’s child sexually abusive materials convictions.

C. FELONY FIREARM

1. LEGAL STANDARDS

When determining whether a defendant possessed a firearm, the question is whether the defendant possessed the firearm at the time he or she committed the felony.³¹ A defendant need only constructively possess a firearm to establish the possession element of a crime.³² A

²⁹ Compare *United States v Amirault*, 173 F3d 28, 34 (CA 1, 1999) (defendant’s subjective reaction not relevant), *United States v Villard*, 885 F2d 117, 125 (CA 3, 1989), (courts must consider the image, not the viewer), with *United States v Wiegand*, 812 F2d 1239, 1244 (CA 9, 1987) (photographs lascivious because defendant arranged them to suit lust), *United States v Wolf*, 890 F2d 241, 245 (CA 10, 1989) (same).

³⁰ See *Riggs*, 237 Mich App at 586, 591-593.

³¹ *People v Burgenmeyer*, 461 Mich 431, 439; 606 NW2d 645 (2000).

³² *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989).

defendant constructively possesses a firearm when the defendant has proximity to the firearm and the power and intent to control it.³³

2. APPLYING THE STANDARDS

Heidenreich contends that insufficient evidence supported his felony-firearm convictions related to his child sexually abusive material convictions because there was no evidence that he possessed a firearm when he recorded the minor. We disagree.

Here, Brent O'Brien testified that Heidenreich carried a handgun with him at all times. Brent O'Brien also testified that Heidenreich usually kept his other guns in the master bedroom. Officers found three handguns in Heidenreich's master bedroom. Heidenreich's master bathroom was connected to and accessible from his master bedroom, which he passed through while recording the 17-year-old.

Viewing this evidence in the light most favorable to the prosecutor, a rational jury could conclude that Heidenreich actually possessed a firearm, or constructively possessed the firearms that were in the master bedroom, while recording the minor in the shower. We conclude that sufficient evidence supported Heidenreich's felony firearm convictions.

III. PREDATORY CONDUCT UNDER OFFENSE VARIABLE (OV) 10

A. STANDARD OF REVIEW

This Court reviews the sentencing court's assessment of a sentencing guidelines variable for clear error.³⁴ A preponderance of the evidence must support the trial court's determinations.³⁵ The proper interpretation and application of the sentencing guidelines is a question of law that this Court reviews de novo.³⁶

B. LEGAL STANDARDS

The trial court must assess 15 points under OV 10 if the crime involved predatory conduct.³⁷ Predatory conduct is "preoffense conduct directed at a victim for the primary purpose of victimization."³⁸ The Michigan Supreme Court has provided standards to help a trial court determine whether it should assess points for predatory conduct:

³³ *Id.*, quoting *United States v Burch*, 313 F2d 628, 629 (CA 6, 1963).

³⁴ *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

³⁵ *Id.*

³⁶ *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

³⁷ MCL 777.40(1)(a).

³⁸ MCL 777.40(3)(a).

(1) Did the offender engage in conduct before the commission of the offense?

(2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation?

(3) Was victimization the offender's primary purpose for engaging in the preoffense conduct?

If the court can answer all these questions affirmatively, then it may properly assess 15 points for OV 10 because the offender engaged in predatory conduct under MCL 777.40.^[39]

Further, the term "predatory" means that the conduct must be " 'predatory' in nature, e.g., lying in wait and stalking, as opposed to purely opportunistic criminal conduct or 'preoffense conduct involving nothing more than run-of-the-mill planning to effect a crime or subsequently escape without detection.' "⁴⁰

C. APPLYING THE STANDARDS

Heidenreich contends that the trial court improperly assessed 15 points under OV 10 because his actions only constituted necessary planning. We disagree.

Here, the 17-year-old daughter testified that Heidenreich was aware that her friend would regularly shower in the master bathroom while she showered in another bathroom. Heidenreich set up and deliberately concealed the camera before the offense. Thus, Heidenreich engaged in pre-offense conduct by setting up and concealing the camera. Heidenreich focused the camera at the area where the child would dress and undress. Thus, the focus of the conduct was victimization. Next, the conduct was directed at a specific susceptible victim, a minor who was vulnerable because of her age and the relationship of trust between herself and Heidenreich through O'Brien's daughter.⁴¹ Finally, given the timing of Heidenreich's setting up the camera in relation to the offense, his conduct was not merely opportunistic. Rather, Heidenreich's conduct resembled lying in wait.

We conclude that the trial court did not clearly err when it assessed 15 points under OV 10 because it properly determined that Heidenreich engaged in predatory conduct.

³⁹ *People v Cannon*, 481 Mich 152, 161-162; 749 NW2d 257 (2008).

⁴⁰ *People v Huston*, 489 Mich 451, 462; 802 NW2d 261 (2011), quoting *Cannon*, 481 Mich at 162.

⁴¹ See MCL 777.40(3)(c); *Huston*, 489 Mich at 464.

IV. CONCLUSION

We conclude that sufficient evidence supported Heidenreich's convictions related to child sexually abusive material and felony firearm. We conclude that the trial court properly assessed 15 points under OV 10 for Heidenreich's predatory conduct.

We affirm.

/s/ Amy Ronayne Krause

/s/ Joel P. Hoekstra

/s/ William C. Whitbeck